No. 355

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CLAUDE VERNON COOPER - - - Petitioner

VS.

ELIZABETH D. COOPER - - - - Respondent

Petition For A Writ Of Certiorari To The Court of Appeals of the Commonwealth of Kentucky

---

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Petition For A Writ Of Certiorari To The Court of Appeals of the Commonwealth of Kentucky

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Petitioner, Claude Vernon Cooper, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky, entered in the above-entitled case on the 21st day of March, 1952.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky on the first appeal (Elizabeth D. Cooper v. Claude Vernon Cooper) is reported in 314 Ky. 413, 234 SW (2d) 658. The

opinion of the Court of Appeals of Kentucky on the second appeal (Claude V. Cooper v. Elizabeth D. Cooper) is reported in 248 SW (2d) 702.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on the 21st day of March, 1952 (R. 761). A petition for rehearing filed by petitioner on the 21st day of April, 1952 (R. 768) was denied on May 30, 1952 (R. 783). The jurisdiction of the court is invoked under 28 USCA, Secs. 1257 and 2101.

The rulings of the Court of Appeals of Kentucky were of a nature to bring this case within the statutes conferring jurisdiction on this court.

This action, in which respondent sought alimony of her ex-husband, was commenced in 1944 (R. 2). Petitioner in supplemental answers pleaded in bar a previous Florida judgment granting him an absolute divorce, and sought full faith and credit for such judgment (R. 529, 584). The Perry Circuit Court sustained petitioner's contention as to the effect of the Florida judgment, and dismissed the petition of respondent (R. 589). Upon appeal by respondent (R. 1), the Court of Appeals of Kentucky reversed the chancellor, and remanded the case with directions "to hear proof as to the question of alimony" (Cooper v. Cooper, 314 Ky. 413, 234 SW (2d) 658; R. 593). Petitioner in a petition for rehearing asserted that the Court of Appeals of Kentucky had failed to give full faith and credit to the Florida judgment and that its failure to do so and the entry of such judgment deprived him of rights guaranteed under Art. 4, Sec. 1, of the Constitution (R. 598). Such petition for rehearing was denied (R. 599). Upon the return of this case to the Perry Circuit Court, a judgment was entered awarding respondent alimony in the sum of $125,000.00 (R. 758). Petitioner upon appeal again relied upon the Florida judgment as a bar to respondent's recovery of alimony, asserting that the chancellor had failed to give full faith and credit to the Florida

judgment. Notwithstanding, the Court of Appeals of Kentucky, while partly reversing the chancellor, directed him to "enter judgment" granting respondent alimony in the sum of $35,000.00, and the use for life of the family home (Cooper v. Cooper, 248 SW (2d) 702; R. 762). Petitioner in a petition for rehearing asserted that the Court of Appeals of Kentucky in the entry of its second judgment had failed to give full faith and credit to the Florida judgment, and that the entry of such judgment constituted a denial to him of rights guaranteed under the Constitution (R. 773). Such petition was overruled (R. 783).

Under such judgment of the Court of Appeals of Kentucky only the ministerial act of the entry by the circuit court of a judgment in accordance therewith remains to be done, and such judgment is reviewable (Republic Natural Gas Co. v. Oklahoma, 334 US 62, L ed. 1212, 68 S Ct 972).

The right of petitioner, asserted consistently since the rendition of the Florida judgment, to have the Florida judgment given in this case the same effect it would have under the laws of Florida arises under Art. 4, Sec. 1 of the Constitution and 28 USCA 1738, and his claim that the Court of Appeals of Kentucky has failed to give the judgment such effect presents a federal question reviewable by certiorari (Green v. Buskirk, 7 Wall 139, 19 L ed. 109; Adam v. Saenger, 303 US 50, 82 L ed. 649, 5 S Ct 454; Titus v. Wallick, 303 US 282, 83 L ed. 653, 59 S Ct 80.)

QUESTION PRESENTED

Whether, consistently with the Full Faith and Credit Clause of the Constitution, a wife may, in the courts of Kentucky, recover alimony of her former husband after the rendition of a decree of divorce by the courts of Florida granting the former husband an absolute divorce, in which action the wife entered an appearance and litigated the former husband's right to a divorce.

STATUTES INVOLVED

The pertinent statutory provisions are presented in an Appendix, infra, p. 15.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of Kentucky erred:

1. In holding that under the laws of Florida a judgment granting a husband an absolute divorce did not preclude the wife from thereafter recovering alimony from him.

2. In holding that the Florida judgment granting petitioner an absolute divorce did not preclude the respondent from recovering alimony of him in this action.

3. In failing to give the Florida judgment the same force and effect in this action which it had under the laws of Florida.

4. In failing to give to the Florida judgment the full faith and credit required by the Full Faith and Credit Clause of the Constitution.

5. In directing the entry of a judgment in this action awarding the respondent alimony.

STATEMENT

The parties were married on November 17, 1921, and lived together in Hazard, Kentucky, until July 10, 1941, at which time they separated. Petitioner in May, 1942, moved to Lexington, Kentucky, where he resided until in February, 1944, at which time he moved to Florida (R. 253). Respondent has at all times resided in Hazard, Perry County, Kentucky. Petitioner now, and since February, 1944, has continuously resided in Port Orange, Volusia County, Florida. (R. 406).

Petitioner on June 10, 1944, filed an action in the Circuit Court of Volusia County, Florida, against respondent for divorce, charging as his grounds for divorce extreme cruelty, a ground for divorce under the laws of Florida (R. 536).

Thereafter, on June 15, 1944, respondent filed this action against petitioner in the Circuit Court for Perry County, Kentucky, for alimony, charging cruel and inhuman treatment, a ground for divorce under the laws of Kentucky, and caused an attachment to be issued and levied on certain property of the petitioner located in Perry County, Kentucky (R. 2). She did not seek a divorce in such action. Petitioner filed an answer in such action on September 23, 1944 (R. 8).

Respondent filed an answer in the Florida action, and in such answer denied the allegations of the complaint (R. 538). She did not assert any claim for alimony (R. 701). She employed counsel in Florida; and, while she did not testify, she, through such counsel, caused to be taken and filed on her behalf in such action numerous depositions (R. 26).

On May 6, 1946, a judgment was entered in the Florida action granting the petitioner an absolute divorce (R. 540). Respondent prosecuted an appeal to the Supreme Court of Florida from such judgment, and such judgment was affirmed by the Supreme Court of Florida on January 9, 1948 (Cooper v. Cooper, 158 Fla. 519, 28 So. (2d) 541).

Petitioner filed supplemental answers in this action in which he pleaded the Florida judgment granting him an absolute divorce and its affirmance by the Supreme Court of Florida as a bar to the right of respondent to maintain this action or recover alimony, alleging that such judgment under the laws of Florida precluded respondent from thereafter recovering alimony of him (R. 529); and petitioner consistently since has maintained that such judgment if and when given the force and effect it would have under the laws of Florida, precludes any recovery of alimony by respondent in this action.

Respondent filed a reply to such supplemental answers of the petitioner (R. 586), and it will be noted that she did not attack the validity of the judgment; but, rather admitted its validity, expressly alleging that "The plaintiff does not attack the judgment of the Florida Court" (R. 587). She

denied that such judgment constituted a bar to her right to recover alimony in this action. We have in this case no claim that the Florida Court did not have jurisdiction of both of the parties and the subject-matter of the action at the time of the rendition of such judgment.

The Perry Circuit Court denied respondent any recovery and dismissed her petition, adjudging that the Florida judgment granting petitioner a divorce under the laws of Florida precluded the respondent from thereafter asserting a claim for or recovering alimony from petitioner, and that the Full Faith and Credit Clause of the Constitution required that such judgment be given such effect in this action (R. 589).

Upon appeal, the Court of Appeals of Kentucky held that under the laws of Florida a judgment granting the husband an absolute divorce did not preclude the wife from thereafter asserting a claim for and recovering alimony from the husband, and remanded the case to the Circuit Court with directions "to hear proof as to the question of alimony" (Cooper v. Cooper, 314 Ky. 413, 234 S W(2d) 659; R. 593).

Upon the return of the case to the Perry Circuit Court, a judgment was rendered awarding the respondent alimony in the sum of $125,000.00 (R. 758). Upon appeal from such judgment (R. 599), the Court of Appeals held the award of alimony to be excessive and reversed the judgment with directions to the lower court "to enter a judgment granting Mrs. Cooper lump sum alimony in the amount of $35,000.00, and the life use of the family home in Hazard" (Cooper v. Cooper, 248 SW (2d) 702; R. 762).

Petitioner since the rendition of the Florida judgment has contended that such judgment under the law of Florida precluded respondent from recovering alimony in this action, and now contends, and since the rendition of its first opinion in this case has contended that the Court of Appeals of Kentucky, in refusing to give the judgment such effect and in directing the entry of a judgment granting respondent alimony, has failed to give such judgment the faith and credit required by the Full Faith and Credit Clause of the Constitution.

REASONS FOR GRANTING THE WRIT

This case presents a question under the Full Faith and Credit Clause of the Constitution. There is no attack upon the validity of the Florida judgment. The jurisdiction of the Florida Court rendering the judgment over the person of the parties and the subject-matter of the action and its power to render such judgment is not challenged. The respondent, through her attorneys, entered her appearance and participated in the trial of the action. The law of Florida afforded her the right to assert in such action, if she desired to do so, a claim for alimony (Garfield v. Garfield, 58 So. (2d) 166; Floyd v. Floyd, 91 Fla. 910, 108 So. 896). She elected not to do so. She was afforded her day in court with respect to every issue in the case, including a right to assert a claim for alimony if she desired to do so. Under such circumstances, there is not anything in the concept of due process which could demand that she be given a second opportunity to litigate her right to alimony. Moreover, she, in her reply, affirmatively states that she "does not attack the judgment of the Florida Court" (R. 587). The judgment is clearly one to which full faith and credit must be given (Yarborough v. Yarborough, 290 US 202, 78 L ed. 269, 54 S Ct 181; Davis v. Davis, 305 US 32, 83 L ed. 26, 59 S Ct 3; Sherrer v. Sherrer, 334 US 343, 92 L ed. 1429, 68 S Ct 1087; Coe v. Coe, 334 US 378, 92 L ed. 1451, 68 S Ct 1094). The command of the Full Faith and Credit Clause of the Constitution, as implemented by congressional legislation, would clearly require that the Court of Appeals of Kentucky in this action must give such judgment the same effect as it would have under the laws of Florida (Magnolia Petroleum Co. v. Hunt, 320 US 43, 88 L ed. 149, 64 S Ct 208). The right of the petitioner to have the judgment given such effect arises under Art. 4, Sec. 1 of the Constitution and 28 USCA 1738, and his claim that the Court of Appeals of Kentucky has failed to give such effect to the judgment, presents a federal question (Green v. Van Buskirk, 7 Wall 139, 19 L ed 109). The modern concept of the effect of divorce decrees would seem to rather emphasize the importance of the question in this case.

The finding of the Court of Appeals of Kentucky that a Florida judgment granting a husband an absolute divorce, rendered in a proceeding in which the court has jurisdiction of the person of the parties and the subject-matter, does not, under the laws of Florida, preclude the wife from thereafter asserting a claim for and recovering alimony is clearly erroneous. There is no case which so holds. The case of Cowan v. Cowan, 147 Fla. 473, 2 So. (2d) 869, cited and relied upon by the Court of Appeals of Kentucky in the opinion as establishing such rule, does not so hold, and such case can afford no basis for such conclusion.

It is the rule in Florida, as established by the cases without exception, that when a final decree of divorce has been entered by a court, which had jurisdiction of the person of the parties and the subject-matter, and the time has elapsed in which appeal may be taken, such decree becomes final and is absolute and puts an end to the relation of the marriage between the parties as effectively as would result from death, and if there is no provision made in that decree, or any former decree entered in the cause, requiring the husband to pay alimony, suit money, or solicitors' fees, all duties and obligations in that regard terminate and cease, and thereafter the divorced wife may maintain no claim against the divorced husband for any of such items.

Carson v. Oldfield, 99 Fla. 862, 127 So. 851. In such case appellee had been granted an absolute divorce from appellant in 1921. She had not sought or otherwise asserted any claim for alimony in such action, and the decree was silent as to alimony. The decree did require appellant to pay $100.00 per month for the support of his children. In 1926 appellant sought a modification of the decree as to payment of maintenance for the children. Appellee resisted such modification, and sought an allowance for suit money and solicitors' fees sufficient to enable her to prosecute her defense to the modification of the judgment. The lower court appointed a special master "to take the testimony as to counsel fees and suit money to be allowed" the appellee. Upon appeal, the Su-

preme Court of Florida reversed such order, holding that the divorce decree precluded the appellee from thereafter assrting any claim against the appellant for such items; and, as constituting the basis of such conclusion, said:

> "On November 4, 1926, the defendant, appellant here, filed a petition for modification of that part of the decree above quoted. The decree of absolute divorce had long before that time become forever fixed, and by the terms of that decree there was no duty or responsibility resting upon the appellant to provide in any manner for the support, maintenance, wants, or needs of the appellee. Both parties had remarried, and neither owed any duty to the other greater than that which existed as between any other members of society . . . . "
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> * * * *
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> " . . . . We think there is no difference, in the respect here involved between the right to claim permanent alimony and the right to claim suit money and solicitors' fees. Whether or not either claim will be allowed will depend, of course, upon evidence where the right exists to have a decree for the same, but if no right upon which the decree may be based, then there exists no necessity for evidence, either in a case praying for alimony, or in one praying for court costs and solicitors' fees."

"In Downey v. Downey, 98 Ala. 373, 13 So. 412, 413, 21 L. R. A. 677, the Court says:

"Most, if not all, of the text writers who discuss the point hold that alimony will not be allowed on a separate proceeding after divorce a vinculo. 1 Amer. & Eng. Enc. Law, p. 479; Schouler, Husb. & Wife, 459; Bish. Mar. & Div. 376 et seq. Indeed, the general rule is that courts of equity have no jurisdiction to grant alimony at all except in and as indicent to a bill for divorce absolute or a mensa et thoro. 2 Pom. Eq. Jur. 1120. But this rule has been departed from by this court, and the doctrine has come to be established with us 'that courts of equity exercise a jurisdiction over the subject of alimony not merely incidental, (to proceedings for divorce) but original, (and wholly separate and apart from proceedings for a dissolution of the bonds of matrimony or

for separation) in cases where the wife's right to maintenance exists.' Glover v. Glover, 16 Ala. 440; Kinsey v. Kinsey, 37 Ala. 393; Hinds v. Hinds, 80 Ala. 226; Murray v. Murray, 84 Ala. 363, 4 So. 239. None of these cases, however, and none that have ever been decided by this court, directly or indirectly support the position asserted by the present bill. On the contrary, the doctrine declared in the case of Glover v. Glover, and reiterated in the subsequent cases cited, is rested on considerations which do not apply in the case at bar. The bills in all those cases were filed by the wives of the several defendants, and not, as here, by a person who had been, but was not at the time of instituting her suit, the wife of the defendant. It was conceded in each of those adjudications that upon general principles of equity jurisprudence, as declared and enforced prior to the first of them, alimony was not allowable except as an incident to relief in a proceeding for divorce; but the court, in effect, extended equity jurisdiction to the allowance of alimony, though no dissolution of the bonds or decree of separation was prayed, expressly on the ground that it is the unquestionable duty of the husband to support the wife, and the inadequacy of legal remedies to enforce this duty. Hinds v. Hinds, supra, and cases there cited. Does this ground exist on the averments of the present bill? Do the complainant and respondent therein sustain the relation of husband and wife to each other? Clearly not. Can there be any duty resting on one as a husband who is not a husband to support another as a wife who is not a wife? Certainly not on general principles, which have never been departed from to this extent, unless the duty becomes fixed and decreed to be performed while the relation of husband and wife still exists, or as a part of the judgment dissolving it. Certain it is that, to the extent this court has changed the general rule, it has been actuated by reasons which do not obtain after the relation of husband and wife has been destroyed by the valid decree of a competent tribunal entailing the release of each party from all the duties incident to the relation."

"And further, in the same opinion, the court says:

"It was long since determined here that a decree of divorce a vinculo puts an end to the relation of marriage

as effectually as would result from the death of either of the parties, and that, as a consequence, all duties and obligations necessarily dependent upon the continuance of that relation immediately cease."

"We approve the expressions of the Supreme Court of Alabama in this regard, and find that the rule there enunciated appears to be supported by the weight of authority . . . ."

In *Tenny v. Tenny*, 137 Fla. 672, 2 So. (2d) 375, it is said:

"The allowance by the court of alimony, suit money, and counsel fees rests entirely on the facts of each case, but it is fundamental and has been consistently held by this court from territorial days that marriage must be established prior to the entry of an order requiring the payment of alimony. The citation of authorization on this point is unnecessary.

"If a decree is entered dissolving the marriage, the former wife certainly has no standing in a court of chancery and there is no duty or obligation due her by the former husband under the provisions of the statutes supra and decisions of this court."

In *Vinson v. Vinson*, 139 Fla. 146, 190 So. (2d) 454, it is held that after an absolute divorce any duty of the husband to thereafter pay alimony must arise out of the decree of divorce. Thus, said the court:

" . . . . the duty of support, originally imposed by the existence of the marriage relation, was to this extent transmitted into a judgment and specifically imposed by the final decree dissolving that relation. However, the marital relation having been completely dissolved, the duty to pay alimony to the former wife springs primarily from that decree."

While Florida does hold, as many other states, that a judgment of another state or country granting a divorce to the husband in an exparty proceeding in which the court granting the divorce did not have jurisdiction over the per-

son of the wife does not preclude a recovery of alimony thereafter by the wife (Chisholm v. Chisholm, 98 Fla. 1196, 125 So. 694; Dye v. Dolbeck, 114 Fla. 866, 154 So. 847; Beckwith v. Bailey, 119 Fla. 316, 161 So. 576; Pawley v. Pawley, 46 So. (2d) 464, our research does not disclose the existence of any case in which the Supreme Court of Florida has permitted the recovery of alimony, suit money or solicitors' fees by a wife after the rendition of a judgment of absolute divorce in an action in which the court had jurisdiction of the person of the parties and the subject-matter of the action.

The Supreme Court of Florida in the case of Phinney v. Phinney, 77 Fla. 850, 82 So. 357, held that where the wife was found to be at fault and the husband was granted a divorce, the wife was not entitled to alimony. Such rule was followed in the case of Nolen v. Nolen, 121 Fla. 130, 163 So. 401. The question was again before the court in the case of Cowan v. Cowan, 147 Fla. 473, 2 So. (2d) 869. In such case the husband sued for divorce, and the wife by cross-bill asserted a claim for alimony. The chancellor granted the husband a divorce and the wife alimony. The husband appealed, contending that the chancellor was without power to grant the wife alimony after having granted the husband a divorce predicated upon a finding of fault on the part of the wife. The judgment was affirmed, and the affirmance was upon the ground that in all cases, other than adultery, the granting of alimony to the wife rested in the discretion of the chancellor and that the evidence did show an abuse of such discretion in granting alimony to the wife. As you will note, Chief Justice Brown dissents upon the ground that the decision of the majority constitutes a departure by the court from the rule of the Phinney case, and in effect overrules it. Such is the Cowan case. It is obvious that such case in no way involved the right of a wife to maintain an action for alimony after an absolute divorce had been granted the husband, and that the decision in nowise modified the long existing rule that a wife after an absolute divorce could not maintain an action for alimony against the husband. And, too, it will be observed that the case of Tenny v. Tenny, 147 Fla. 672, 2 So.

(2d) 375, which was decided by such court only twenty days after the opinion in the Cowan case was delivered, re-affirms and applies the rule that a wife after an absolute divorce cannot maintain an action for alimony against her divorced husband. It is patent that the Cowan case furnished no basis for the conclusion of the Court of Appeals of Kentucky that a wife, under the laws of Florida, may recover alimony of the husband after an absolute divorce.

The cases cited establish that under the laws of Florida the question of alimony is one of the issues to be disposed of in the divorce action itself, and that, in the absence of an award of alimony in the decree, there can be no grant of alimony after such decree of divorce becomes final. The underlying rationale is that the divorce judgment terminates the marriage relation and thereby puts to an end any rights or obligations having their root in the marriage relation, and that for such reason no right to alimony, suit money or solicitors' fees can survive except as awarded by the final decree of divorce.

The Court of Appeals of Kentucky recognized that "under ordinary circumstances, the Florida decree would be conclusive of the question of alimony. Hughes v. Hughes, 211 Ky. 799, 278 SW 121." The sole reason of the Court of Appeals of Kentucky for permitting the alimony action to be maintained in Kentucky was its misconcept of the Florida law, based upon a misreading of the Cowan case, which has been discussed above.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 21, 1952

APPENDIX

18 USCA. 1737:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

"The records and judicial proceedings of any court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

CHAPTER 65, FLORIDA STATUTES:

"65.01 Divorce to be by bill in equity.—Suits for divorce shall in all cases be by bill in equity.

"65.02 Residence required.—In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint.

"65.03 All divorces to be a vinculo.—No divorce shall be from bed and board, but every divorce shall be from bonds of matrimony.

"65.04 Grounds for divorce.—No divorce shall be granted unless one of the following facts shall appear:

(1) That the parties are within the degrees prohibited by law.

(2) That the defendant is naturally impotent.

(3) That the defendant has been guilty of adultery.

If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with intent to procure a divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.

(4) Extreme cruelty by defendant to complainant.

(5) Habitual indulgence by defendant in violent and ungovernable temper.

(6) Habitual intemperance of defendant.

(7) Willful, obstinate and continued desertion of complainant by defendant for one year.

(8) That the defendant has obtained a divorce from the complainant in any other state or country.

(9) That either party had a husband or wife living at the time of the marriage sought to be annulled.

"65.05 Effect of decree of divorce on children.—No decree of divorce shall render illegitimate the children born during the marriage, except when it is rendered upon the ground set forth in paragraph nine of 65.04, in which case the marriage shall be invalid from the beginning and the issue illegitimate and subject to all the legal disabilities of such issue.

"65.06 Proceedings against nonresident defendants.—Bills for divorce may be brought against defendants residing out of the state, and service shall be effected upon them as in other cases in chancery.

"65.07 Alimony pendente lite.—In every suit by a wife for a divorce founded upon any of the grounds mentioned in 65.04, she may in the bill for divorce, or by petition, claim alimony and suit

money, and, if the bill seems well founded, the court shall allow a reasonable sum therefor. Or if a wife defendant in any suit for divorce shall in her answer, or by petition, claim alimony or suit money, and the answer or petition shall seem well founded, the court shall allow a reasonable sum therefor.

"65.08 Alimony upon decree of divorce.—In every decree of divorce in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just; but no alimony shall be granted to an adulterous wife. In any award of permanent alimony the court shall have jurisdiction to order periodic payments or payment in lump sum.

"65.09 Alimony unconnected with divorce.—If any of the causes of divorce set forth in 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife.

"65.10 Alimony unconnected with causes of divorce.—If any husband having ability to maintain or contribute to the maintenance of his wife or minor children shall fail to do so, the wife, living with him or living apart from him through his fault, may obtain such maintenance or contribution upon bill filed and suit prosecuted as in other chancery causes; and the court shall make such orders as may be necessary to secure to her such maintenance or contribution.

"65.11 Effect of decree of alimony.—A decree of alimony granted under 65.08 and 65.09 shall release the wife from the control of her husband, and she may use her alimony and acquire, use and dispose of other property, uncontrolled by her husband; and when the husband is about to remove himself or his property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against him or his property, and make such order or decree as will secure the wife's alimony to her.

"65.12 Proceedings against absent defendants in suits for alimony.—Proceedings against absent defendants in suits for alimony shall be the same as in other chancery causes.

"65.13 Attachment or garnishment of amounts due in suits for alimony and divorce.—So much as the court in its discretion may order of the moneys or other things due to any person or public officer, state or country, whether the head of a family or not residing in this state when the money or other thing is due for the personal labor or service of such person or otherwise, shall be subject to attachment or garnishment to enforce the orders or decrees of the courts of this state for alimony, suit money or support, or other orders or decrees made by the courts of this state in suit for divorce or alimony; and in such cases where the money or other thing sought to be attached or delayed is the salary of a public officer, state or county, the writ of attachment or garnishment may be served upon the public officer whose duty it is to pay such salary who shall respect and obey the same as provided by law in other cases; and it shall be the duty of such officer, immediately upon receipt of such writ, to notify the public officer whose duty it is to audit or issue a warrant for the salary sought to be attached or delayed, of the service of such writ, and such officer shall not issue a warrant for so much of such salary as ordered held under said writ until such case shall be settled or determined, and then in accordance therewith, and

no more of such salary than is provided for in the order of the court shall be retained by virtue of such writ.

"65.14 Custody of children, etc., power of court in making orders. In any suit for divorce or alimony, the court shall have power at any stage of the cause to make such orders touching the care, custody and maintenance of the children of the marriage, and what, if any, security be given for the same, as from the circumstances of the parties and the nature of the case may be fit, equitable and just, and such order, touching their custody as their best spiritual as well as other interests may require.

"65.15 Modification of alimony decrees; agreements, etc.—Whenever any husband and wife heretofore, or hereafter, shall have entered into any agreement, providing for the payments for, or in lieu of, separate support, maintenance or alimony, whether in connection with any action for divorce or separate maintenance, or with any voluntary property settlement, or whenever any husband has pursuant to the decree of any court of competent jurisdiction been required to make his wife any such payments, and the circumstances of the parties or the financial ability of the husband shall have been changed since the execution of such agreement, or the rendition of such decree, either party may apply to the circuit court of the circuit in which the parties or either of them, shall have resided at the date of the execution of such agreement, or shall reside at the date of such application, or in which such agreement shall have been executed, or in which such decree shall have been rendered, for an order and judgment decreasing or increasing the amount of such separate support, maintenance or alimony, and the court, after giving both parties an opportunity to be heard, and to introduce evidence relevant to the issue, shall make such order and judgment as justice and equity shall require, with due regard to the changed circumstances and the financial ability of the

husband, decreasing or increasing or confirming the amount of separate support, maintenance or alimony provided for in such agreement, or in such decree.

"Thereafter the husband shall pay and be liable to pay the amount of separate support, maintenance or alimony directed in such order and judgment, and no other or further amount, and such agreement, or such decree, for the purpose of all actions or proceedings of every nature and wherever instituted, whether within or without this state, shall be deemed to be and shall be, modified accordingly, and it shall be unlawful to commence, or cause to be commenced as party, or attorney, or agent, or otherwise, in behalf of either party in any court any action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance or alimony otherwise than pursuant to such order and judgment.

"This section is declaratory of existing public policy and laws of this state, which is hereby affirmed and confirmed in conformance with the provisions hereof, and it shall be the duty of the judges of the circuit courts of this state to construe liberally the provisions hereof in order to effect the objects and purposes hereof and the public policy of the state as hereby declared.

"65.16 Divorce; subsequent proceedings; costs, fees, etc.—

(1) Whenever any legal proceeding is brought for the purpose of enforcing a decree or order of the court, providing for the payment of alimony or support for children, the court may, in the exercise of a sound judicial discretion, allow to the divorced wife such sums of suit money, including a reasonable attorney's fee, as from the circumstances of the parties and the nature of the case shall be fit, equitable and just.

(2) Any order so made under the provisions of this section shall be enforced in the same manner as are other chancery orders or decrees.

"65.17 Attorneys' fees, suit money, etc., in alimony, divorce and similar proceedings.—Whenever any court shall make any allowance for attorney's fees, suit money or costs in any divorce, alimony or support proceeding pending before it, such court may direct that all such allowances be paid to the attorneys or other persons for whose ultimate benefit such allowances are made.

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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. [redacted]355

CLAUDE VERNON COOPER, *Petitioner,*

vs.

ELIZABETH D. COOPER, *Respondent.*

BRIEF FOR RESPONDENT

In Opposition to the Petition for Writ of Certiorari to the Court of Appeals of the Commnwealth of Kentucky

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WILLIAM ERNEST FAULKNER,
SIMEON S. WILLIS,
Counsel for Respondent.

GRABER PRINTING CO., ASHLAND, KY.

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I

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.
No. 335

CLAUDE VERNON COOPER, *Petitioner,*

vs.

ELIZABETH D. COOPER, *Respondent.*

BRIEF FOR RESPONDENT

In Opposition to the Petition for Writ of Certiorari to the Court of Appeals of the Commnwealth of Kentucky

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Elizabeth D. Cooper, in opposition to the petition herein filed by Claude Vernon Cooper for a Writ of Certiorari to the Court of Appeals of Kentucky, respectfully represents:

I.

This was an action in the Circuit Court of Perry County, Kentucky, by Elizabeth D. Cooper against her husband, Claude Vernon Cooper, to recover two tracts of land located in Hazard, Perry County, Kentucky, which was her home, and $100,000 in alimony (Transcript of Record, pp. 2-6). This action was filed on June 15, 1944, and an order of attachment was obtained

and levied upon stock in the Peoples Bank of Hazard, Kentucky. The bank answered that it held subject to the order of the Court 250 shares of stock and dividends in the name of C. V. Cooper (Transcript of Record, pp. 10-11).

Thus, in 1944, the Perry Circuit Court acquired jurisdiction over the Kentucky property which was maintained, and is still maintained.

On September 23, 1944, Cooper filed an answer and a counter-claim for divorce (Transcript of Record, pp. 8-10). Cooper had already, on June 8, 1944, filed an action for divorce in Florida. It was agreed that both cases should proceed, and that evidence taken by either party, in either case, might be filed and made a part of the record in the two cases (Transcript of Record, p. 25). Thus it was agreed that the Florida case for a divorce alone, and the Kentucky case for alimony alone, should be prepared. A large amount of evidence was taken and on May 3, 1946, the Circuit Court of Volusia County, Florida, granted Cooper a divorce (Transcript of Record, pp. 540-541). No reference was made in the decree to alimony or property rights.

Then on June 17, 1946, Cooper filed a supplemental answer setting up the divorce as a defense to the pending action in Kentucky (Transcript of Record, p. 529). The Special Judge of the Perry Circuit Court did not pass on the merits, but dismissed the action (Transcript of Record, p. 589).

Appeal was taken to the Court of Appeals of Kentucky and that Court, on May 26, 1950, reversed the Circuit Court of Perry County holding that the Florida decree granting Cooper a divorce was not conclusive of the right of Mrs. Cooper to recover the real estate claimed by her, and did not preclude Mrs. Cooper from

recovering permanent alimony (Transcript of Record, pp. 593-598). Cooper vs. Cooper, 314 Ky. 413, 234 S.W. (2d) 658.

Upon return of the case to the Perry Circuit Court, a motion was made by counsel for Cooper to limit the additional evidence to the question of alimony, which was sustained (Transcript of Record, p. 607).

Upon completion of the additional testimony, the Circuit Court rendered judgment awarding Mrs. Cooper her home property and $125,000 in alimony (Transcript of Record, pp. 758-761). Cooper prosecuted an appeal to the Court of Appeals from that judgment and on March 21, 1952, that Court reduced the allowance of alimony to $35,000 and the title to the land to a mere life estate (Transcript of Record, pp. 762-768). Cooper vs. Cooper, 248 S.W. (2d) 702 (no official report).

On the first appeal, the Court decided that the Florida decree fixed the marital status of the parties, but did not preclude Mrs. Cooper from obtaining the relief sought by her in the Perry Circuit Court.

The full faith and credit required by the Constitution was respected, the Court saying:

> "In order to give full faith to the Florida decree, we are not required to go as far as the Supreme Court of the United States did in the case of Estin vs. Estin, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 A.L.R. (2d) 1412, wherein it was said:
>
> " 'The result of this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status, and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New

> York in this broken marriage by restricting each state to matters of her dominant concern.' "

In Kentucky an opinion of the Court of Appeals constitutes the law of the case thereafter, binding both the Circuit Court and the Court of Appeals.

Notwithstanding this long established rule, Cooper, on the second appeal, attempted to re-argue the question of the effect of the Florida decree. The Court, in the second opinion, in answer to the contention, said:

> "The appellant seeks to argue again the question of whether the Florida divorce judgment barred Mrs. Cooper's right to claim alimony, but that question was settled on the first appeal and will not be again considered."

Hence it is clear that the question now sought to be reviewed was settled on the first appeal finally and conclusively so far as the Kentucky Courts were concerned. If it was desired to have that question reviewed by this Court, it should have been done within the time allowed after it was decided on the first appeal. It is now too late to invoke the discretion of this Court to review that question.

II.

JURISDICTION.

(a) The judgment of the Court of Appeals of Kentucky disposing for this state of the effect of the Florida decree was rendered on May 26, 1950, and became final after petition for rehearing was denied on December 15, 1950, when the Court's mandate was issued (Transcript of Record, p. 600).

The "law of the case" doctrine in Kentucky is that an opinion of the Court of Appeals is binding and con-

clusive on the Circuit Court and on the Appellate Court as well. West's Kentucky Digest, Appeal and Error, Key Numbers 1097(1) and 1097(2).

Hence it is now too late for Cooper to have a review in this Court of a judgment rendered on May 26, 1950, which passed beyond the control of the State Courts on December 15, 1950.

Bruce vs. Tobin, 245 U. S. 18, 38 S. Ct. 7, 62 L. Ed. 123;

Martinez vs. International Banking Corp., 220 U. S. 214, 55 L. Ed. 438, 31 S. Ct. 408;

Mississippi C. R. Co. vs. Smith, 295 U. S. 718, 79 L. Ed. 1673, 55 S. Ct. 830.

When the State Court has spoken its final word on a federal question, the decision is immediately reviewable, and not afterwards. Tippecanoe County vs. Lucas, 93 U. S. 108, 23 L. Ed. 822; Mower vs. Fletcher, 114 U. S. 127, 29 L. Ed. 117, I S. Ct. 799; Market Street Ry. Co. vs. Railroad Commission of California, 324 U. S. 548, 65 S. Ct. 770, 89 L. Ed. 1171 (Anno 1186).

(b) Kentucky, like every state of the Union, has jurisdiction to determine for itself the liability of property within its limits to seizure under the process of its courts.

Clark vs. Willard, 292 U. S. 112, 78 L. Ed. 1160;

Same case, second appeal, 294 U. S. 210, 79 L. Ed. 865;

Green vs. Buskirk, 5 Wall 307, 18 L. Ed. 599, 7 Wall 13, 19 L. Ed. 109;

Hervey vs. Rhode Island Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003;

Security Trust Co. vs. Dodd, 173 U. S. 624, 43 L. Ed. 837, 19 S. Ct. 545.

(c) The Court of Appeals of Kentucky gave full faith and credit to the Florida judgment insofar as it fixed the marital status of the parties and it was required to go no farther.

The right of Kentucky to determine the liability of Cooper to his deserted wife, and to subject the property it held under due process to that liability, was in no way impaired or affected by the Florida decree.

In Pennington vs. Fourth National Bank, 243 U. S. 269, 61 L. Ed. 713, 37 S. Ct. 282, this Court said:

> "The 14th Amendment did not, in guarantying due process of law, abridge the jurisdiction which a state posessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property.
>
> "Indebtedness due from a resident to a non-resident of which bank deposits are an example—is property within the state. Chicago R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1714, 19 S. Ct. 797. It is indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. Harris vs. Balk, 198 U. S. 215, 49 L. Ed. 1023, 25 S. Ct. 625, 3 Ann. Cases 1084. Substituted services on a non-resident by publication furnishes no legal basis for a judgment in personam. Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman vs. Alderson, 119 U. S. 185, 30 L. Ed. 373, 7 S. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercisee of this power.
>
> "It is asserted that these settled principles of law cannot be applied to enforce the obligations of an absent husband to pay alimony without violat-

ing the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection, without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim.

"It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the Court. The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt,— that is, it will be valid not in personam, but as a charge to be satisfied out of the property seized. Cases are cited in the margin."

Seizure may be by attachment, garnishment or injunction. In the *Pennington case* the process was injunction. But the most usual form is by attachment (39 A.L.R., Anno., 1387). In this and other States land described in a pleading is sufficiently seized.

Holmes vs. Holmes, 283 Fed. 453;

Rice vs. Kelly, 226 Ky. 347, 10 S.W. (2d) 1112.

It is well established, and indeed unquestioned, that the pendency of an action for divorce in one State does not bar an action for divorce or alimony, or to vindicate the rights of property, in another State.

Nelson on Divorce and Annulment, Vol. 3, p. 429;

Schouler Divorce Manual, p. 213.

The granting of a divorce works no change.

In *Spitzer* vs. *Superior Court,* 74 Cal. App. 494, 241 Pac. 270-272, the Court stated:

> "It is also the rule that the Court in which an action is pending wherein it has jurisdiction of the parties and the cause, is not deprived of jurisdiction to hear and determine the cause by the fact that a decree of another Court adjudging dissolution of the marriage has become final during the pendency of such action."

Ross vs. Ross, 79 Fed. Supp., 716.

In this case there was no pretense of litigating in the Florida Court the property rights involved in the Kentucky litigation. The cases were prepared and practiced on the tacit, if not express, agreement that the divorce action would be tried in Florida and the alimony and property rights adjudicated in the Kentucky case. The opinion on the first appeal makes this clear, and the record in support of that conclusion of the Court is incontestable.

This constituted not only a reservation of the questions now presented, in this Court, but manifested a proper respect by the Florida Court for the authority and jurisdiction of the Kentucky Court of Appeals on the first appeal.

It is the law of Kentucky and of Florida that a divorce does not preclude the granting of alimony accrued when it has been reserved expressly in the decree of divorce, or by facts and circumstances equivalent to an express reservation.

Wallace vs. Wallace, 218 Ky. 212, 291 S.W. 42;

Lyon vs. Lyon, 243 Ky. 236, 47 S.W. (2d) 1072;
Dodd vs. Dodd, 278 Ky. 662,, 129 S.W. (2d) 166;
Hanks vs. Hanks, 282 Ky. 236, 138 S.W. (2d) 362;
Hyman vs. Hyman, 149 Fla. 530, 6 So. (2d) 535;
Cowan vs. Cowan, 147 Fla. 473, 2 So. (2d) 869.

III.

"A review of writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor" (Rules of Supreme Court, 38-5). No new question is presented.

The parties began their married life in 1921 without property. The evidence in this case shows that by thrift and energy the parties accumulated an estate of the value of at least $250,000. It was all in Cooper's name, including Mrs. Cooper's home which she had conveyed to him just before he deserted her. He took another man's wife and located in Florida. After both had obtained divorces, Cooper married her. The Court of Appeals reduced the judgment of the Circuit Court from $125,000 and the home to a mere $35,000 with only a life estate in the home.

The Court of Appeals of Kentucky gave long and patient consideration to the case and fully respected the Florida decree as fixing the marital status. It was not entitled to the consequential effect of ousting the Kentucky Court of Jurisdiction to determine the property rights of Mrs. Cooper, accrued when Cooper deserted her for another woman. The Kentucky Court carefully followed the decisions of this Court. Cooper not only left his wife penniless, but he wrecked her health. In doing so, he broke up two families, and then slandered and abused his wife shamelessly. In view

of the decisions of this Court, and of the Kentucky and Florfida Courts, there is no sound basis for a further review of this record. For over eight years Cooper has harassed, hounded and injured this innocent woman, and it is time to end the struggle.

Wherefore, it is respectfully submitted, the petition for a Writ of Certiorari should be denied.

WILLIAM ERNEST FAULKNER,
SIMEON S. WILLIS,

Counsel for Respondent.

Ashland, Kentucky,
October 6, 1952.

OCT

No. 355

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

CLAUDE VERNON COOPER - - - *Petitioner*

vs.

ELIZABETH D. COOPER - - - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

REPLY BRIEF FOR PETITIONER

LESLIE W. MORRIS
MARION RIDER
Counsel for Petitioner

ROBERTS PRINTING CO., FRANKFORT, KY.

No. 355

SUPREME COURT OF THE UNITED STATES

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CLAUDE VERNON COOPER - - - - - - *Petitioner*

vs.

ELIZABETH D. COOPER - - - - - - *Respondent*

REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition to the petition fails to meet the central issue in the case.

Rule 38, Paragraph 5(a), of the Rules of this Court, indicates that a petition for certiorari will be favorably considered:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with the applicable decisions of this court."

It was, and is petitioner's contention that the decision of the Court of Appeals of Kentucky in this case either ignore or misapplies the doctrine of Magnolia Petroleum Company v. Hunt, 320 U.S. 43, 88 L.

ed. 149, 64 S. Ct. 208. The Hunt case, following a long line of similar discussions, held that the Full Faith and Credit Clause of the Federal Constitution compels a state court to give the same force and effect to a judgment of a sister state as would be given by the courts of such sister state. The Florida cases cited in our petition for certiorari make it clear beyond all doubt that Mrs. Cooper could not have recovered alimony from Mr. Cooper in the State of Florida after Mr. Cooper obtained his decree of divorce from her. And, at the risk of repetition, we state once more that Mrs. Cooper, though a resident of Kentucky, voluntarily appeared and contested the right of Mr. Cooper to a divorce up through the highest court of Florida. Thus, the Florida judgment, to which the Kentucky Court of Appeals did not accord full faith and credit, was a valid personal judgment and in no wise *ex parte*.

These contentions cannot be controverted. Indeed, distinguished counsel for respondent has not sought to controvert them. Instead, he has injected into the case, belatedly, issues which do not belong here, and which have no possible bearing on the matter now presented at his bar.

Two of these matters may be summarily disposed of: First, no question has been raised with respect to the jurisdiction of the Kentucky courts. Therefore, the discussion at the bottom of page 5 of the respondent's brief is entirely beside the point. Granting that the Kentucky courts possessed jurisdiction, they were under constitutional compulsion to exercise that jurisdiction in accordance with the Full Faith and Credit Clause of the Federal Constitution. The mere fact that a court proceeds by way of attachment does not relieve it of the duty to obey the Constitution. Second, the discussion of Mr. Cooper's conduct toward and relations with Mrs. Cooper on pages 9 and 10 of respondent's brief has no place here. The merits of that question are not before this Court. The Flor-

ida courts considered all of those issues; and the present question is whether the Kentucky courts had the power to ignore the judgment of the Florida court and reconsider them.

Only two statements are made in respondent's brief which bear upon the case in its present posture. These contentions deserve brief consideration:

1. Respondent contends that petitioner is precluded from challenging the judgment now in issue by his failure to seek relief in this Court from the judgment rendered by the Court of Appeals on the first appeal in 1950. The judgment of the Court of Appeals of Kentucky rendered on the first appeal on May 26, 1950, was not a final judgment (R. 592). The court in such judgment only found that the Florida divorce judgment did not constitute a bar to the right of the respondent to prosecute an action for alimony, and reversed the judgment with directions to the lower court "to hear proof as to the question of alimony" (R. 592.) The Court of Appeals of Kentucky in such judgment did not find or adjudge that the respondent was entitled to recover alimony of the petitioner. Such judgment made no final disposition of the case. The effect of the order reversing the judgment dismissing the petition and remanding the case with directions "to hear proof as to the *question* of alimony" was to direct a trial of the question of alimony. Such question involved (1) a determination of the right of respondent to alimony, and (2) the amount of alimony, if she be found entitled to alimony. These questions were judicial. Moreover, any judgment rendered by the Perry Circuit Court, pursuant to such remand, awarding alimony to respondent, was subject to review by the Court of Appeals. Thus, the judgment rendered on the first appeal lacked the basic elements of finality (Gospel Army v. Los Angeles, 331 U.S. 543, 91 L. ed. 1662, 67 S. Ct. 1428; Department of Banking v. Pink, 317 U.S. 268, 87 L. ed. 257, 635 S. Ct. 233.)

Subsequently, the Perry Circuit Court found that respondent was entitled to recover alimony, and adjudged that she recover of petitioner alimony in the sum of $125,000.00 and the life use of the family home (R. 768.) Thus, although the Court of Appeals had held on the first appeal that the Florida divorce decree did not bar a prosecution by the respondent of her claim for alimony, any denial of the federal right asserted by petitioner must of necessity result from the direction on the second appeal of the entry of a judgment requiring him to pay alimony.

The fact that the Court of Appeals of Kentucky on the second appeal declined to reconsider the force and effect to be given the Florida divorce decree does not deprive the Supreme Court of jurisdiction to review the judgment rendered (Louisiana Navigation Co. v. Oyster Commission, 226 U.S. 99, 57 L. ed. 138, 33 S. Ct. 78; Urie v. Thompson, 337 U.S. 163, 93 L. ed. 1282, 69 S. Ct. 1018; United States v. United States Smelting Co., 339 U.S. 186, 94 L. ed. 750, 70 S. Ct. 537.)

2. Respondent asserts that "the cases were prepared and practiced on the tacit, if not expressed, agreement that the divorce action would be tried in Florida and the alimony and property rights adjudicated in the Kentucky case."

Respondent's contention is unsupported by the record and finds no basis in either of the opinions of the Kentucky Court of Appeals. Indeed, respondent never asserted before the Kentucky courts that such an agreement existed, although petitioner pleaded the Florida decree as a defense to respondent's alimony action immediately after its rendition.

The only agreement ever made related simply to the mechanics of the case, and by this agreement the depositions taken in the Florida case were made a part of the record in the Kentucky case (R. 25.)

If such an agreement as respondent asserts was ever entered into, it is incredible that its existence should have been unnoticed by both the respondent and the Kentucky courts throughout these proceedings.

It is true that the Florida court made no express adjudication of the property rights of the two parties. But, Mrs. Cooper was before the court and, if she had seen fit to do so, could have sought alimony in the Florida action. Under the Florida law, the failure to do so, when she had the chance, precluded her from raising the question at a later date (*Carson* v. *Oldfield*, 99 Fla. 862, 127 So. 851.) And if she was shut off in Florida, she was shut off in Kentucky—by the Full Faith and Credit Clause of the Federal Constitution.

Petitioner urges that the writ issue.

Respectfully submitted,

LESLIE W. MORRIS
MARION RIDER
Counsel for Petitioner

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Office - Supreme Court,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 355

CLAUDE VERNON COOPER, - - - *Petitioner*

vs.

ELIZABETH D. COOPER, - - - *Respondent*

MOTION

1. Comes the petitioner, Claude Vernon Cooper, by counsel, and moves this Court for the entry of an order as to the costs of the above-styled case, pursuant to Rule 38, Paragraph 8, of the Rules of this Court.

2. In support of such motion petitioner states that the sole question involved in the above-styled case was whether a certain judgment and decree of the Circuit Court of Volusia County, Florida, as affirmed by the Supreme Court of Florida, was given and adjudged full faith and credit by the Court of Appeals of Kentucky in its opinion and judgment in the above-styled cause, and in accordance with the Full Faith and Credit Clause of the Constitution of the United States. Numerous other questions had been presented in the trial of this case below, and many depositions, affidavits, orders and similar matters filed and entered

of record in this case, which had no bearing, materiality or effect on the issue which petitioner sought to present to this Court.

3. Pursuant to Rule 38, Paragraph 8, of the Rules of this Court, counsel for petitioner, in an effort to omit from the printed record to be presented to this Court all matter not essential to a consideration of the question raised in the petition for certiorari, prepared a stipulation for omission from the printed record of such irrevelant matter, and on July 17, 1952, submitted such stipulation, by mail, to counsel for respondent for consideration and execution. Such stipulation was as follows:

"SUPREME COURT OF THE UNITED STATES

CLAUDE VERNON COOPER, - - - - *Petitioner*

vs.

ELIZABETH D. COOPER, - - - - - *Respondent*

STIPULATION

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that for the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and determining the case on its merits, the printed record shall consist of the following:

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7. Answer of C. V. Cooper 14
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9. Answer of Peoples Bank 17
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21. Exhibit A—with Supplemental Answer 689
22. Exhibit B—with Supplemental Answer 695
23. Exhibit C—with Supplemental Answer 700
24. Second Amended Answer of C. V. Cooper 763
25. Mandate—Supreme Court of Florida 764
26. Reply to Supplemental and Amended Answer 766
27. Order—Sept. 30, 1948 768

28. Judgment—Sept. 30, 1948 768
29. Judgment—Court of Appeals—May 26, 1949 783
30. Opinion of Court of Appeals—May 26, 1949 784
31. Order overruling petition for rehearing 804
32. Mandate 806
33. Order 821
34. Order of submission 1019
35. Judgment (Nov. 26, 1951) 1028
36. Order—Court of Appeals 1030
37. Order—Court of Appeals—reversing 1041
38. Opinion 1042
39. Order filing petition for rehearing 1054
40. Petition—caption and page 15 to 20, inclusive 1055
41. Order overruling petition for rehearing 1059
42. Order granting stay 1060
43. Certificate of Clerk 1068

It is further stipulated and agreed that either of the parties may refer in their briefs and arguments to the record filed in the Supreme Court, including any part thereof which has not been printed.

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Attorneys for Petitioner

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Attorneys for Respondent

July ....., 1952"

Office carbon of the letter of transmittal to counsel for respondent is as follows:

"July 17, 1952

Judge S. S. Willis
Attorney at Law
Ashland, Kentucky

Re: Cooper v. Cooper

Dear Judge Willis:

We have obtained from the Clerk of the Court of Appeals a copy of the record in the Cooper Case, and intend to file in the office of the Clerk of the Supreme Court in a few days.

We enclose for your signature stipulation with respect to the parts of the record to be printed.

The parts of the record indicated to be printed constitute substantially all of the record except the depositions and orders considered not material, and we think constitutes all of the record material to a determination of the constitutional question which we propose to raise.

Will you please give this your immediate attention, and let us hear from you as soon as possible.

Yours respectfully,

MR:j
enc."

4. Thereupon, counsel for respondent were instructed by respondent, arbitrarily to refuse the stipulation proposed by petitioner or any other stipulation for the omission of irrevelant matter from the printed record in this case. Such refusal was communicated to counsel for petitioner by counsel for respondent by letter, dated July 25, 1952, as follows:

"July 25, 1952

Judge Leslie W. Morris
Frankfort, Kentucky

Dear Judge Morris:

After talking with you this afternoon on the 'phone and after going over such parts of the record as I have in connection with your proposed stipulation I called the attention of the plaintiff, Mrs. Cooper and members of her family to the matter, explaining that you are about to file a petition for Writ of Certiorari in the Supreme Court, and that it will be necessary to have the record or parts of the record printed for the court. Mrs. Cooper and her family object to any stipulation concerning the parts of the record to be printed. I have called attention to the size of the record and the probable cost of printing it. However, I am instructed not to stipulate. It appears I have no discretion in the matter.

I called Judge Willis and consulted with him and he advised me that unless we have the consent of our client we cannot enter into a stipulation. I understand fully what this means in the matter of cost, but I know of no way I can help under the circumstances.

Very truly yours,

(s) W. E. FAULKNER
W. E. FAULKNER

WEF/gb"

5. The effect of respondent's refusal to stipulate for the omission of such irrevelant matter from the printed record was to increase petitioner's costs in the action, drastically, unnecessarily and unfairly. If respondent had accepted the stipulation proposed by petitioner, then the printed record in this case before this Court would have consisted of not more than 85 pages, and the cost of printing the same would have not been more than $433.50. By reason of respondent's

refusal to accept such stipulation, petitioner was required to have printed the entire record of a length of 785 printed pages, and at a cost of $4,022.96. Such increase in the length of the printed record and in the cost of printing the same, was not necessary, was not based upon any contention that the stipulation proposed by the petitioner was inadequate; inflicted undue burden on this Court; and unjustifiably increased petitioner's costs in this action by $3,589.46.

6. Petitioner, therefore, sincerely believing that such facts call for the exercise by this Court of its power under Rule 38, Paragraph 8, of the Rules of this Court, moves this Court to make and enter an order taxing to respondent, as costs recoverable by petitioner, the sum of $3,589.46, or such other sum as the Court shall deem proper under the circumstances.

Respectfully submitted,

LESLIE W. MORRIS,

MARION RIDER

Counsel for Petitioner